SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 601

IN THE MATTER OF
THE PEORIA AND EASTERN RAILWAY COMPANY

EPPLER & COMPANY,
Petitioner,
v.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY AND THE PEORIA AND EASTERN RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

GEORGE W. JAQUES,
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and GEORGE W. JAQUES,
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EUGENE H. NICKERSON,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Eppler & Company, petitioner, respectfully prays that a writ of certiorari issue to the United States District Court for the Southern District of New York, to review the order of that Court, sitting as a three-judge Special Court, which order was entered on December 28, 1948 (R. 73-75) in the

Railroad Adjustment Proceeding, entitled *In the Matter of Peoria and Eastern Railway Company,* denying the petition of Eppler & Company (herein called "Eppler") for an allowance for certain services and disbursements rendered in the proceeding. Section 745 of the Bankruptcy Act provides for such direct review in this Court. See p. 7, *infra.*

Opinion Below

The opinion of the District Court appears at R. 69-73 and is not yet reported.

Statement of Matter Involved

This case arises in the Railroad Adjustment Proceeding of The Peoria and Eastern Railway Company (herein called "The Peoria") under Chapter XV of the Bankruptcy Act. 53 Stat. 1134 (1939).[1] The District Court disapproved that part of the petition on behalf of Eppler, a firm of accountants, which sought $47,005.16 for testifying and preparation of factual data and exhibits in the proceeding. The Court held that although the sum was "reasonable in amount both as to the services rendered and the expenses incurred," the Court could not charge the amount against The Peoria.

Nature and Summary of the Issues

This petition concerns a further phase of *Income Bondholders of The Peoria and Eastern Railway Company* v. *The New York Central Railroad Company, et al.,* now pending on petition for certiorari to this Court, No. 511, October Term, 1948.

The petition already before the Court is concerned with Adjustment Proceeding of The Peoria, and more specifically relates to the accounts between The New York Central Rail-

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[1] This Chapter XV expired on July 31, 1940, Bankruptcy Act, § 755, but jurisdiction of the cases pending on that date (including this case) was reserved by §§ 746 and 755.

road Company and The Cleveland, Cincinnati, Chicago & St. Louis Railway Company (herein called the "Operating Companies") and The Peoria. The accountants' services and disbursements for which compensation was sought by Eppler in the present case were rendered in the Adjustment Proceeding.

In order to understand the background of this petition, it is necessary to recall the outlines of the proceeding already before the Court. The Operating Companies are fiduciaries of The Peoria, its majority stockholder, and dominate and control it. They apportion the joint revenues and expenses and determine the intercompany financial accounts. The basic issues before the Court in the Adjustment Proceeding are whether those fiduciaries must, in accordance with the usual standard, be fair to The Peoria and whether they bear the burden of establishing such fairness in their self-dealing transactions.

Those issues arose in the following context. In 1940 the First Mortgage Bonds of The Peoria were about to fall due, and an Operating Agreement of 1890, under which the Operating Companies operated The Peoria, was about to expire. Pursuant to Chapter XV of the Bankruptcy Act, §710(2), The Peoria filed with the Interstate Commerce Commission an application for authority to modify its securities in accordance with a Plan of Adjustment, including an extension of the maturity date of the First Mortgage Bonds, and to renew the Operating Agreement of 1890 until 1960 (239 I. C. C. 303). The Interstate Commerce Commission approved the Plan of Adjustment and the extension of the Operating Agreement (239 I. C. C. 303, 320). The Peoria then instituted proceedings in the District Court pursuant to Chapter XV of the Bankruptcy Act.

A committee of Income Bondholders having been permitted to intervene, opposed the Plan of Adjustment, and

argued, in part, that the claim of the Operating Companies for an alleged debt of $2,500,000 should not be allowed. The District Court approved the Plan of Adjustment. *Ewen* v. *Peoria & E. Ry. Co.,* 34 F. Supp. 332 (1940). But the Court left open the question of whether the claim of the Operating Companies was valid, and provided in § 24 of its decree that should the Operating Companies seek to withdraw any part of the earnings of The Peoria to repay the alleged intercompany accounts, then, upon objection by a representative of the Income Bondholders elected to the board of directors as provided by the Court's order, the Operating Companies "must prove and establish their right to do so." *In re Peoria & Eastern Ry. Co.,* 37 F. Supp. 917 (1941).

In 1943 the director of The Peoria who represented the Income Bondholders objected in accordance with the Court's decree to a proposed withdrawal by the Operating Companies of earnings of The Peoria (R. 19). The Operating Companies, thereupon, petitioned for the appointment of a Master to hear and report on the validity of the claim of the Operating Companies, and prayed that the order approving the Plan be modified as might be just and proper (R. 2-11).

By order of May 21, 1943 the District Court appointed a Special Master and also appointed Charles S. Aronstam, Esq. as counsel to represent the Income Bondholders, and provided that the latter "with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith" (R. 13-14, 24).

Eppler was then approached in June, 1943 to make a study of the intercompany accounts between The Peoria and the Operating Companies (R. 26). After making a preliminary examination of the issues, Eppler advised counsel for the Income Bondholders that it would be willing to accept employment if the Operating Companies were

agreeable and provided that Eppler would be free to discuss with the Operating Companies all questions affecting the intercompany accounts (R. 26). On June 21, 1943 the representatives of the majority stock interest in The Peoria, namely, the Operating Companies, and the representatives of the interests of the Income Bondholders approved the appointment of Eppler (R. 26-27). Thereafter a formal application to the Master, the representative of a third body having an interest in The Peoria, namely, the Court, was made for approval of the employment (R. 27). The Master approved the employment of Eppler and read into the record its schedule of rates (R. 27-29). After Eppler had been employed and had commenced its examination of intercompany accounts, the District Court, by order dated July 2, 1943, approved the appointment of one Adams as attorney to represent The Peoria (R. 22). Without any consultation with the director of The Peoria representing the Income Bondholders (R. 55), the Operating Companies selected and nominated Adams to represent their adversary, The Peoria (R. 36, *cf.* 11 with 17).

The results of Eppler's examination of the intercompany accounts, which consumed many months, were embodied in the so-called "Eppler Report." The report found that the transactions reflected in the intercompany accounts from 1920 through 1942 deviated from fair and standard railroad practices (R. 37). The report concluded that had fair railroad practices been used by the Operating Companies the alleged debt to them did not exist, and that instead they owed The Peoria some $12,000,000 in principal amount (R. 37).

The Eppler Report was delivered to the Operating Companies on July 5, 1944, to the end that the parties might meet for the purpose of narrowing the issues before the Master (R. 29-30). Although the Operating Companies took over six months to examine the Eppler Report and

supporting data, they refused to discuss the items contained therein but instead stated that they were ready to proceed with the hearings (R. 29-30). It thus became necessary to present in Court the entire case on behalf of The Peoria on the issues as contained in the Eppler Report. Eppler was therefore required to render services in the proceedings, testifying before the Special Master, and preparing exhibits and other data.

The District Court approved payment of the bill of Eppler for services and disbursements in connection with the preparation of the Eppler Report (R. 70-73). The Court said: "the work of these experts was not duplicative of that of other employees retained by the petitioning debtor and the basic data assembled was available to the debtor and to others," that although the conclusions in the Report were not accepted by counsel for The Peoria, "the study threw a flood of light upon the field of controversy, and, on all the facts viewed against the situation then existing, we are satisfied that it constituted a service to the debtor and should be treated as an item of expense to the debtor." (R. 72). The Court approved payment of the bill for rendering the Eppler Report as being "at a rate which seems to us reasonable," namely, $72,073.44 (R. 72).

The Court, however, denied compensation to Eppler for testifying before the Special Master and for preparing exhibits and other data, although it concluded that the bill for such services, namely, $47,005.16 was "reasonable." The Court said it could not classify as expenses of the debtor's estate such services since they had been rendered at the "call" of counsel for the Income Bondholders (R. 72-73).

Jurisdiction

The order of the Special District Court was entered on December 28, 1938 (R. 73-75). Jurisdiction of this Court

is invoked under §745 of the Bankruptcy Act, which provides that "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the provisions of the Federal Judicial Code."

The controversy with respect to the validity of the intercompany accounts, although postponed to the final stages of the Adjustment Proceeding, was, of course, an integral part of it. The Plan of Adjustment of The Peoria proposed to leave unchanged the status of the claim of the Operating Companies against it, but the District Court in its decree modifying the Plan left this portion open and reserved it for future determination. The final decree of the District Court settling the intercompany debt was by its own terms an amendment to the decree approving the Plan.

By the same token the payments to Eppler were a necessary part of any plan approved by the District Court. Section 725 of the Act provides that the Court shall enter a decree approving or modifying the Plan only if it finds, among other things:

> "(6) That, after hearings for the purpose, all amounts or considerations, directly or indirectly paid or to be paid by or for the petitioner for expenses, fees, reimbursement or compensation of any character whatsoever incurred in connection with the proceeding and plan, or preliminary thereto or in aid thereof, together with all the facts and circumstances relating to the incurring thereof, have been fully disclosed to the Court so far as such amounts or considerations can be ascertained at the time of such hearings, that all such amounts or consideration are fair and reasonable, and to the extent that any such amounts or considerations are not then ascertainable, the same are to be so disclosed to the Court when ascertained, and are to be sub-

> ject to approval by the special court as fair and reasonable, and except with such approval no amounts or considerations covered by this clause (6) shall be paid."

Thus any plan to be approved by the Court must contain appropriate provision for the payment by the petitioner of "expenses, fees, reimbursement or compensation of any character whatsoever incurred in connection with the proceeding and plan." As the Court said, with respect to fees in reorganization proceedings, in *Leiman* v. *Guttman*, No. 88, this Term, decided January 17, 1949, "The incidence of fees on reorganization plans is so great that control over them is deemed indispensable to the court's determination whether the plan should be confirmed." The same thing is true with respect to the payment of fees in a Railroad Adjustment proceeding. The payment of appropriate fees is an essential part of the plan.

There can also be no doubt that Eppler is "affected by the plan." It is significant that although by § 706 of the Act a "creditor" is not deemed to be "affected" by the plan unless it proposes a "modification" of the instrument defining the creditor's rights or of the security for the creditor's claim, review is authorized by § 745 on petition not merely of any "creditor" but of "any person" affected.

Eppler "deems" itself clearly "aggrieved" within the terms of § 745, having been denied more than one-third of its compensation for services and disbursements rendered.

Questions Presented

1. Whether petitioner, appointed with the approval of the Special Master, whose *per diem* rates for time spent attending in Court as witnesses and in preparation of the case were actually read into the record by the Master, should be deprived of an allowance for such services and disbursements.

2. Whether the services rendered by petitioner in testifying and preparation of exhibits and data were "duplicative" of the work of others, although no such work was performed by others on behalf of The Peoria.

3. Whether the District Court properly denied an allowance for services and disbursements.

Reasons Relied On for Allowance of Writ

Section 725(6), *supra*, pp. 7-8, of the Railway Adjustment Act provides, in pertinent part, that all amounts "directly or indirectly paid or to be paid by or for the petitioner for expenses, fees, reimbursement or compensation of any character whatsoever incurred" in connection with the proceeding are "subject to approval by the special court as fair and reasonable." The Court below allowed Eppler no compensation at all for testifying and preparing exhibits and data in connection with the case, because it did not consider that such work was "for" The Peoria, within the terms of the statute, apparently on the ground that the work was performed at the "call" of Mr. Aronstam, who had been appointed as counsel for the Income Bondholders, whereas the estate of the debtor was "adequately represented" by other counsel.

The error in this ruling is plain from the circumstances under which Eppler was employed. Eppler was not employed to assist one group of security holders in The Peoria against another. All the work of Eppler was performed solely on behalf of The Peoria, as an entity, against the Operating Companies, which Eppler found had been unfaithful to their trust in apportioning joint revenues and expenses and in determining the intercompany financial accounts and had misstated the accounts to the extent of more than $12,000,000.

It is true that issues had been raised in the Adjustment Proceeding with respect to the relative claims of the various

classes of security holders in The Peoria as against each other. Those issues were determined in prior proceedings before the District Court. *Ewen* v. *Peoria & E. Ry. Co.*, 34 F. Supp. 332 (1940); *In re Peoria & Eastern Ry. Co.*, 37 F. Supp. 917 (1941). But the Court specifically left open the claim of The Peoria, on the one hand, against the Operating Companies, on the other. The proceeding involving the contest on that claim, and which did not concern the relative claims of the classes of security holders in The Peoria, was the proceeding in which Eppler rendered services.

At the inception of the contest between The Peoria and the Operating Companies, the order dated May 21, 1943 was entered providing (a) for the appointment of counsel of the Income Bondholders, the only group in the proceeding asserting the interest of The Peoria against the Operating Companies, and (b) for the employment, with the approval of the Master, of accountants and traffic experts in connection with the proceeding.

By reason of the fact that the Railroad Adjustment Act makes no provision for the appointment of a trustee or receiver of the debtor's estate, no such official was available to prosecute the action for The Peoria against the Operating Companies. The representative of the Income Bondholders was therefore appointed by the Court to perform the task which in an ordinary proceeding it would have been the duty of a trustee or receiver to perform. The Court plainly had power to make that appointment, since § 713 of the Act provides that the Court "shall be vested with and shall exercise all the powers of a district court sitting in equity and all the powers as a court of bankruptcy necessary to carry out the intent and provisions" of the Act.

Any appointment of counsel who might have been suggested by the corporate directors in control of The Peoria,

all but one of whom were officers or directors of the Operating Companies, might not have assured undivided loyalty to The Peoria to the entity in which all security holders had a stake. Although after Eppler's employment a Vice President of the Operating Companies, also a Vice President of The Peoria, applied for the appointment of additional counsel to represent The Peoria, the order appointing such counsel made no provision for the employment of accountants. The necessary work by accountants had already been provided for in the order of May 21, 1943.

It is hornbook law that services, including accountant's services, performed for one bearing an official status, such as a receiver or trustee who brings or defends an action against an outside party on behalf of the estate are compensable out of the estate, regardless of the outcome of the action. 1 Clark, Receivers (2d ed.), § 642, and cases cited; High, Receivers, § 811; 3 Collier, Bankruptcy, 14th ed., §§ 62.09-62.12, and cases cited.

Thus a receiver or trustee has been held entitled to reimbursement for such expenses incurred in such an action in which he had been defeated, whether brought against him by another, *Missouri & K. I. Ry. Co.* v. *Edson*, 224 Fed. 79, 82-83 (C. C. A. 8th 1915), or by him against another. *In re Flaherty*, 295 Fed. 699, 701 (D. Mont. 1924); *In re Hoffman*, 173 Fed. 234 (E. D. Wisc. 1909); *cf. In re Owl Drug Co.*, 16 F. Supp. 139, 142-143 (D. Nev. 1936, *aff'd, sub nom, Cohn* v. *Elder*, 90 F. 2d 823 (C. C. A. 9th 1937).

Had a receiver or trustee been available to assert the interest of The Peoria against the Operating Companies, there can be no doubt that the expenses incurred for the fees of accountants, appointed pursuant to Court order, would be paid from the assets of the debtor.

Upon his appointment by the Court to perform the duty ordinarily incumbent on a receiver or trustee, the counsel for the Income Bondholders stood, from the viewpoint of payment of the accountants' fees, in an official position analogous to that of a receiver or a trustee bringing and defending an action against an outside party. Services rendered by accountants employed by him are therefore compensable in the same manner as if they had been rendered to a receiver or a trustee. The fact that the appointment of a receiver or trustee of The Peoria was not provided for in the Railroad Adjustment Act did not leave The Peoria at the mercy of the Operating Companies and did not make the services of accountants any less vital to the prosecution, approved by the Court, of the claim of The Peoria against the Operating Companies.

It was urged below that the District Court's prior decision, *In re Peoria & Eastern Railway Company,* 37 F. Supp. 917 (1941), *cert. denied,* 314 U. S. 635 (1941), is authority for the proposition that the Court has no power to permit payment of the Eppler bill. The Court below rejected that contention. The prior decision is plainly inapposite. The entire proceeding which culminated in that opinion concerned issues between the various classes of security holders as against each other, with respect to their relative claims in the assets of petitioner. Since the statute required that compensable expenses be those "directly or indirectly paid or to be paid by or for the petitioner", the Court held that fees could not be allowed to attorneys who acted not derivatively on behalf of The Peoria as a whole, but rather on behalf of a rival claimant to The Peoria's assets.

In this proceeding, on the other hand, the entire contest was not between rival claimants to The Peoria's assets but

between The Peoria itself and outside entities asserting a contrary interest.

It was plainly erroneous of the Court below to hold that Eppler should not be paid for testifying and preparing exhibits and data on the ground that the debtor was "adequately represented" by others. The work of Eppler was not in any sense duplicative of the work of others. The Eppler Report was the basis for the claim of The Peoria for $12,000,000 against the Operating Companies. The testimony of Eppler and the data which it prepared constituted the core of The Peoria's case. Indeed counsel selected by the Operating Companies to represent its adversary The Peoria opposed the bulk of the conclusions reached by the Eppler Report, and the Eppler testimony and data were thus not in any sense repetitive of any material introduced by him, but were, in the main, likewise opposed by him.

The employment of Eppler was approved by the Master in accordance with the order of the District Court designating counsel and permitting him "with the approval of the special master" to "employ accountants and traffic experts to assist" in connection with the proceeding. Moreover, all groups which asserted an interest in The Peoria approved the employment: the Operating Companies, having a majority stock interest, the Income Bondholders, and the officer of the Court (R. 26-27). It was never suggested that Eppler should, contrary to the consistent practice of accountants, take employment on a contingent basis. Furthermore, Eppler's *per diem* rates were read into the record by the Master, including the following statement as to court attendance: "The charges for time spent in attendance at court as witnesses, or waiting to be called as witness, and time spent in conference with counsel and

working with counsel in preparation of case, shall be based upon the foregoing rates, except that any part of a day less than seven hours so spent shall constitute a day." (R. 29).

The charges for time spent by Eppler in Court or in preparation of the case were as much agreed upon by the parties as were the charges for preparation of the Eppler Report. The services rendered in Court were as essential to The Peoria as those involved in preparation of the report. Since the Court below held that the report was rendered on behalf of The Peoria and that the expenses of its preparation were properly charged to The Peoria, the work and time necessary to sustain the conclusions of the report must also properly be chargeable to The Peoria.

The Court will appreciate that the issues involved in the proceeding pending before it in No. 511, this Term are of vast importance. In that case it is claimed that the Operating Companies were unfaithful to their duty as fiduciaries and owe The Peoria $12,000,000 principal amount. The testimony of Eppler and the data prepared by Eppler constitute the factual basis for this claim. Having rendered services in reliance upon the order of the Court and the approval of the Master, Eppler is entitled to the compensation which it had reason to expect.

Conclusion

Eppler has been deprived of more than one-third of the compensation for services which it rendered in reliance on the order of the District Court and the approval of the Master. The services of Eppler constitute the main basis for the claim of The Peoria that the Operating Companies misstated their accounts in the principal amount of $12,-000,000. Having faithfully discharged its employment pur-

suant to Court order, Eppler should not be unjustly deprived of compensation for its services.

Wherefore, it is respectfully submitted that this petition for certiorari to review the order of the Special District Court for the Southern District of New York should be granted.

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Counsel for Petitioner.

Milbank, Tweed, Hope & Hadley,
and George W. Jaques,
Attorneys for Petitioner.
Eugene H. Nickerson,
Of Counsel.

(1164)

Supreme Court of the United States

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CHARLES S. ARONSTAM,
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BRIEF OF RESPONDENTS, THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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SAMUEL H. HELLENBRAND,
LEE P. GAGLIARDI,
Of Counsel.

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Statement.

Petitioners seek writs of certiorari to review an order of the United States District Court for the Southern District of New York, entered December 28, 1948, denying petitioners' applications for allowances

for services and disbursements which they seek to charge against the Peoria and Eastern.* The order denies *in toto* the application of petitioner Aronstam for allowance of legal fees and disbursements and denies that part of the application of petitioner Eppler which seeks an allowance for preparing evidence and testifying in hearings before a Special Master.

The services for which compensation is sought by both petitioners were rendered in a railroad adjustment proceeding brought by the Peoria and Eastern under the provisions of former Chapter 15 of the Bankruptcy Act (53 Stat. 1134). By decree entered July 8, 1940 (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. denied 311 U. S. 700), and order supplemental to decree dated April 29, 1941 (*In re Peoria and Eastern Railway Company,* 37 F. Supp. 917, cert. denied 314 U. S. 635), a three-judge Special Court granted the petition of the Peoria and Eastern for adjustment of its maturing bond indebtedness, but left open for future determination all questions concerning the amount and validity of the accounts between the Peoria and Eastern and the Operating Companies. In April, 1943, the Special Court granted the petition of the Operating Companies for the appointment of a special master to hear and report on the amount and validity of the inter-company accounts (R. 13-14).

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* The parties will be referred to herein as follows: Peoria and Eastern—The Peoria and Eastern Railway Company; New York Central—The New York Central Railroad Company; Big Four—The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Operating Companies—New York Central and Big Four.

The order appointing the Special Master, which was prepared and submitted by petitioner Aronstam, also provided:

> "Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated *as counsel to represent the Income Bondholders* of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further
>
> "Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as],* shall be approved and determined by the court" (R. 14). (Emphasis ours.)

* The language in brackets was stricken out by the Court before signing the order.

Thereafter petitioner Aronstam retained petitioner Eppler as accountants and traffic experts; petitioner Eppler investigated the intercompany accounts between the Operating Companies and the Peoria and Eastern and made a report to petitioner Aronstam; and, on the basis of said report and the testimony of petitioner Eppler in support thereof, petitioner Aronstam asserted claims in large amounts against the Operating Companies in the hearings before the Special Master.

The Peoria and Eastern was represented at the hearings before the Special Master by F. W. H.

Adams, Esq., whose appointment as counsel for the Peoria and Eastern was approved by order of the Special Court (R. 22). Mr. Adams also advanced claims against the Operating Companies, including items upon which some of the Income Bondholders' claims were based.

At the conclusion of the hearings the Special Master rendered his report recommending dismissal or disallowance of all claims with the exception of claims in the total principal amount of approximately $130,000. Upon the unanimous decision of the Special Court (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312) a decree was entered confirming the report of the Special Master with slight modifications. A petition for a writ of certiorari to review that decree was denied by this Court on February 28, 1949 (*Income Bondholders of the Peoria and Eastern Railway Company* v. *The New York Central Railroad Company, et al.,* 336 U. S. 919).

Petitioner Aronstam made application to the Special Court for fees and disbursements in the total amount of $133,390.38 (R. 33-53), and application on behalf of petitioner Eppler for an allowance for services and disbursements in the total amount of $119,451.86 (R. 23-32) to be charged against the Peoria and Eastern.

The Special Court by unanimous decision (R. 69-73) denied the application of petitioner Aronstam, and denied that part of the application of petitioner Eppler which represented services and disbursements in preparing evidence and testifying, and entered the order here sought to be reviewed (R. 73-75).

Jurisdiction of This Court.

Before discussing the merits of the pending applications for certiorari, we beg leave to refer to the statutory provision upon which the petitioners base their claim of the Court's jurisdiction (Petition, Aronstam, p. 7; Petition, Eppler, p. 7).

Chapter 15 of the Bankruptcy Act, which was approved July 28, 1939 and expired by its own terms on July 31, 1940, provided a simple and inexpensive method for railroads which were solvent, but temporarily unable to meet maturing debts, to adjust such debts. The law authorized the approval of a plan of adjustment by a three-judge Special Court and specified the parties entitled to appeal and the method by which appeal might be taken. Section 745 of the statute, upon which petitioners rely, provides:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved * * *"

Petitioners argue that they are "aggrieved" by this portion of the plan but fail to consider the effect of Section 706 of the Act, the terms of which preclude these applications by petitioners. That section provides:

> "No creditor shall be deemed to be 'affected' by any plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor."

The order complained of neither "proposes a modification of the evidence of debt or other instrument defining the rights" of the petitioners "or a modification of the security, if any", for the claim of petitioners.

Issue Before This Court.

The question of jurisdiction to one side, the only issue presented on these applications is petitioners' contentions that the decision of the Special Court is erroneous.

Petitioners' Applications for Allowances Were Properly Denied.

The Special Court found it unnecessary to decide the question whether it had jurisdiction under the statute to make the allowances requested, but it is clear from the consistent holdings in all of the cases brought under Chapter 15 of the Bankruptcy Act that the Court had no such jurisdiction. Petitioners here contend that their services "protected the interests" of the Peoria and Eastern (Petition, Aronstam, pp. 11, 12, 15) and that they occupy the same status as receivers or trustees in reorganization proceedings (Petition, Eppler, pp. 10, 11, 12). These contentions are the same arguments advanced by representatives of security holders in the *Baltimore and Ohio* case, the *Lehigh Valley* case and the instant case, in each of which the Court found that under the terms of the Act it had no jurisdiction to grant such allowances, and in each of which petitions for certiorari were denied by this Court. *In re Baltimore and Ohio Railroad Company,* 34 F. Supp. 154, cert.

den. 311 U. S. 717; *Schweidel v. Lehigh Valley Railroad Co. et al.*, unreported order Oct. 21, 1940, cert. den. 312 U. S. 684; *In re Peoria and Eastern Railway Company*, 37 F. Supp. 917, cert. den. 314 U. S. 635.

In all of those cases the courts clearly recognized the distinction, as to allowances, between Chapter 15 of the Bankruptcy Act dealing exclusively and comprehensively with *adjustments* and other chapters dealing with *reorganizations,* and denied applications of intervenors for allowances. In the instant case, at the conclusion of the adjustment proceeding, petitioner Aronstam made application for allowances. In denying the petition the Court said (*In re Peoria and Eastern Railway Company, supra,* p. 921):

> "It seems to us clear that Chapter 15 of the National Bankruptcy Act covering Railroad *Adjustments,* in so far as allowances to others than the petitioner Railway are concerned, is not in *pari materia* with Title 11 United States Code, Section 205, 11 U. S. C. A. §205, which deals with the Reorganization of Railroads. * * *
>
> It seems to us that the omission of such a provision from Chapter 15 of the National Bankruptcy Act, which gave a three-judge court jurisdiction in *Proceeding for Railway Adjustment,* makes it quite clear that we have not any jurisdiction properly to grant any allowances herein to the intervenors or their counsel."

Certiorari was denied, 314 U. S. 635.

The services for which petitioners now seek compensation were rendered on behalf of the Income

Bondholders. The order of appointment prepared and submitted by petitioner Aronstam and signed by the Court provides that Mr. Aronstam "is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith" (R. 14). The provision in the proposed order providing that the compensation of petitioners as counsel, accountants and traffic experts "shall be borne and paid by the Peoria and Eastern Railway Company" was stricken from the order by the Court before signing.

In addition, the Special Court approved the appointment of independent counsel to represent the Peoria and Eastern in the proceeding, and in doing so overruled the objection by petitioner Aronstam that his "representation of the Income Bondholders is in effect tantamount to representing the Peoria and Eastern" (R. 20).

Under such circumstances, if the Special Court had any jurisdiction to make allowances to petitioners, such jurisdiction could be based only upon the general equity powers of the court, and the compensation of petitioners as representatives of a class of security holders, would depend on the benefit accruing to the corporation from their efforts. This familiar rule was recently stated by the New York Court of Appeals in *Sterling Industries, Inc.* v. *Ball Bearing Pen Corp., et al.*, 298 N. Y. 483, 493:

> "If the Middleman-Shindel group has a cause of action, its rights will be fully protected in

equity and its counsel compensated from any recovery and only from a recovery on behalf of the corporation, subject to the approval of the court. If there be no cause of action, the plaintiff corporation will not have that discovered in equity at its expense."

The petitions herein emphasize petitioners' labors in preparing and advancing claims against the Operating Companies in amounts in excess of ten million dollars (Petition, Aronstam, pp. 5, 6, 13, 14; Petition, Eppler, pp. 5, 9, 13, 14); but these claims, with the exception of claims in the principal amount of approximately $130,000 all of which were either instituted by or supported by Mr. Adams as counsel for the Peoria and Eastern, were disallowed (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312, cert. den. 336 U. S. 919). Not only did the Peoria and Eastern not benefit from the efforts of petitioners but the activities of the Income Bondholders, whom petitioners represented, resulted in actual net loss to the Peoria and Eastern (R. 57-59).

The Special Court, in denying petitioners' applications, said (R. 71):

"For even if we had power to make the allowance requested we feel that we could not properly charge against the estate of a debtor adequately represented an expense incurred solely at the instance of the bondholders. Petitioning counsel himself disclaims any retainer, direct or indirect, by or in behalf of the debtor. Rather, he relies upon the court's order of May 21, 1943. But the plain language of that order approved only his requested designation to represent the income

bondholders and his request then made for an order that the compensation for such representation be eventually charged against the estate of the petitioning debtor was unequivocally rejected by the court.

It follows, therefore, that as a charge against the Peoria this petition must be wholly disallowed, —disallowed not only as to the compensation of counsel and his disbursements listed in his petition as incurred and paid but also as to the appended bills of the expert witnesses retained by the petitioner without request or authorization either by the debtor or by the court."

* * * *

"It appears, however, that these experts [Eppler] rendered further service in assisting counsel for the bondholders to prepare for the hearings and in testifying at his call. Such services, like those of the other expert witnesses retained and called by counsel for the bondholders, we cannot classify as expenses of the debtor's estate."

There is an additional reason why the Eppler petition should be denied. After the entry of the order petitioner Eppler requested and received payment of the amount allowed by the court. "The general rule is well settled that unless there is a separable controversy, or unless there is some sum to which the appealing party is entitled in any event, he may not accept the benefit of the decree and later appeal." *Spencer* v. *Babylon R. Co.,* 250 Fed. 24, 26 (C. C. A. 2nd); In re *Denney,* 135 F. (2d) 184 (C. C. A. 7th); *Colquette* v. *Crossett Lumber Co.,* 149 F. (2d) 116 (C. C. A. 8th).

Conclusion.

We respectfully submit that the order of the Special Court properly denied petitioners' applications for allowances and that no reasons have been shown which warrant review by this Court.

Respectfully submitted,

Gerald E. Dwyer,
Counsel for Respondents, The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

Samuel H. Hellenbrand,
Lee P. Gagliardi,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 600.

In the Matter
of
THE PEORIA AND EASTERN RAILWAY COMPANY.

CHARLES S. ARONSTAM,
Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,
Respondents.

No. 601.

EPPLER & COMPANY,
Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

F. W. H. ADAMS,
Counsel for Respondent, The Peoria and Eastern Railway Company.

PETER KEBER,
Of Counsel.

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Respondents.

BRIEF OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

Statement.

Charles S. Aronstam, Esq., as counsel for the Income Bondholders, and Eppler and Company (herein called Eppler), accountants, retained by Mr. Aron-

stam as such counsel, pray that writs of certiorari issue to the United States District Court for the Southern District of New York, sitting as a three-judge Special Court, to review the order of that Court, entered December 28, 1948 (R. 73-75). That order denied their separate claims for services and disbursements said to have been rendered in the Railroad Adjustment Proceeding affecting the Peoria and Eastern Railway Company.*

The Railroad Adjustment Proceeding in which the petitioners claim compensation was originally commenced in 1940 by the Peoria pursuant to Chapter XV of the Bankruptcy Act (53 Stat. 1134)** for approval of a Plan of Adjustment which had been approved by the Interstate Commerce Commission (239 I. C. C. 303). The adjustment was sought because in 1940 the First Mortgage Bonds of the Peoria were about to become due, and an agreement made in 1890, under which the Peoria was operated by the Big Four and later, by the New York Central, was about to expire.

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* We have used the following abbreviations:

P. & E., or the Peoria—the respondent, The Peoria and Eastern Railway Company.

Big Four—the respondent, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

New York Central—the respondent, the New York Central Railroad Company, controlling stockholder of the Big Four and after 1930 lessee of its property, including its interest in the P. & E.

Operating Companies—New York Central and Big Four.

Income Bondholders—a Protective Committee of the P. & E.'s Second Mortgage non-cumulative 4% Income Bonds, due 1990.

** The statute expired on July 31, 1940, except for pending proceedings, of which the Adjustment Proceeding, in which these claims were made, is one.

The District Court, by a decree entered on July 8, 1940, approved the Plan of Adjustment (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. denied 311 U. S. 700; *In re Peoria and Eastern Railway Co.,* 37 F. Supp. 917, cert. denied 314 U. S. 635). However, at the insistence of the Income Bondholders, represented then as now by the petitioner, Aronstam (R. 70), the question of the amount and validity of the accounts between the operating companies and the Peoria was left open for future determination. It was specifically provided, again at the insistence of the petitioner, Aronstam, that should the operating companies attempt, in any year, to withdraw any assets or earnings of the P. & E., upon objection by the representative of the Income Bondholders, the operating companies were required to establish their right to do so (R. 9, 21).

On April 1, 1943, after objection by the representative of the Income Bondholders to the annual accounts, the New York Central petitioned for an order appointing a Master under the decree to hear and report upon the validity and amount of the claim of the operating companies against the Peoria for advances in the sum of $2,356,687.33 as of December 31, 1942 (R. 2-11).

This petition was on notice to the petitioner, Aronstam, as attorney for the Income Bondholders Committee. On their behalf he answered, consenting to the appointment of the Master (R. 11-13).

The petitioner, Aronstam, then submitted an order providing for the appointment of the Special Master and also providing for his own appointment as attorney for the Income Bondholders, with his compensa-

tion to be paid by the Peoria (R. 4, 14, 19). The Court signed the order on May 23, 1943 but struck therefrom the provision requiring the Peoria to pay the compensation of petitioner Aronstam. The order, with the provision so stricken out shown in brackets, reads as follows:

> "Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further
>
> Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation, [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as] L. H., J. M. W., G. M. H. shall be approved and determined by the Court."

In view of the relationship between the New York Central and the Peoria, arising out of the stock control of the Peoria by the New York Central, and arising out of the operating agreement, the New York Central and the Big Four recognized the desirability of the Peoria's securing independent counsel to represent it in connection with the settlement of the inter-company accounts (R. 16, 17, 62).

On July 2, 1943, upon the petition of the New York Central, the Court appointed the undersigned, who

had no prior relationship with any of the parties, as an independent attorney to represent the Peoria (R. 22, 62). The appointment was on the specific understanding that the undersigned should protect the interests of the Peoria to the best of his ability as an attorney without regard to any stock or other control by the New York Central (R. 68, 69).

Thereafter, petitioner Aronstam retained Eppler, as accountants and traffic experts to assist him, as counsel for the Income Bondholders. This appointment was approved by the Special Master before the appointment of the undersigned as independent counsel to the Peoria. At the first hearing before the Special Master thereafter it was made clear that the undersigned, as independent counsel for the Peoria, did not consent to the payment of any of its funds to Eppler for services (R. 75-79).

Eppler then investigated the inter-company accounts and made a report. On the basis of this report petitioner Aronstam asserted claims against the operating companies before the Master in excess of $12,000,000, exclusive of interest (R. 37).

It is suggested that the positions taken by the Income Bondholders at the hearings before the Master were opposed by the undersigned. (Aronstam petition, p. 6; Eppler petition, p. 13.)

This is not the case (R. 58). After his appointment as independent counsel, the undersigned considered the proposed accounts, independently investigated the records of both the Peoria and the Operating Companies and generally investigated all possible issues (R. 62-65). With respect to each issue, consideration was given not only to the overall interests of the Peoria in relation to past transactions, but also in relation to its future welfare, without regard to the

special interests of any particular group of security holders (R. 58). The mere fact that the Income Bondholders saw fit to assert a particular claim did not, in our view, create an identity of interest between the P. & E. and the Income Bondholders, or provide a sufficient basis for adopting it. For the same reasons, where a claim of the Income Bondholders appeared to be detrimental to the best interests of the P. & E., it was, without hesitation, opposed. It is perhaps significant in this regard that the only claims allowed in this case, out of the $12,000,000 asserted by the petitioners, were those originated or supported by the undersigned (R. 58).

After hearings before the Special Master, and the coming in of his report, the Court, with minor adjustments, unanimously approved his report. (*Ewen, et al.* v. *Peoria and Eastern Railway Co.,* 78 F. Supp. 312.) The final result was that out of the enormous claims, both in number and amount, asserted by the petitioners, claims of $176,206.36, including interest, were allowed by the Court. The allowed claims, as above stated, were all either originated or supported by the undersigned (R. 57).

The allowance of these claims, however, actually was not a gain for the Peoria but, in fact, constituted a loss. Actually the whole adjustment, including all interest allowances and conceded adjustments, amounted to $246,240.68 (R. 57). However, the Peoria was, by the action of the Income Bondholders in objecting to the accounts, compelled to pay interest, at 6%, on the total advances of the operating companies instead of receiving credit on its earnings (R. 57, 58). This interest was $342,637.47 (R. 58).

The result, therefore, of the proceedings brought about by the petitioner, Aronstam, was that the Peoria

lost the difference between $342,637.47 interest incurred and the sum of $246,240.68, the benefits alleged to have been obtained by the Income Bondholders, or $96,396.70, before the granting of any allowances (R. 58).

After the entry on November 16, 1948 of the decree establishing this loss, the Income Bondholders petitioned for a writ of certiorari for its review. This petition was denied by this Court on February 28, 1949. (*Income Bondholders of the Peoria and Eastern Railway Co.* v. *The New York Central Railroad Company, et al.*, 336 U. S. 919.) Therefore, the whole of this proceeding has finally concluded with a loss to the Peoria, before considering expenses, of at least $96,396.70.

The petitioner Aronstam, after the entry of the final decree on November 16, 1948, applied to the Special Court for fees and disbursements aggregating $133,390.38 (R. 33-53) and made an application on behalf of Eppler for services and disbursements in the sum of $119,451.86 (R. 23-32).

The application of Aronstam was unanimously rejected by the Special Court (R. 70-71). Eppler's application was allowed in respect of the part of its services devoted to preparing a report, and denied in respect of its claim for assisting counsel for the Income Bondholders to prepare for the hearings and testify at his call (R. 71-73).

Both Aronstam and Eppler now pray for writs of certiorari to review the order of the Special Court, entered December 28, 1948.

ARGUMENT.

I.

This Court has no jurisdiction.

(a)

Both petitioners claim that this Court has jurisdiction under Section 745 of Chapter XV of the Bankruptcy Act (1939, 53 Stat. 1134) which, as we have seen, expired by its terms on July 31, 1940 (Section 755) (Aronstam petition, p. 7; Eppler petition, p. 7). That section provides as follows:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved * * *"

The petitioners do not come within the definition of those "affected" by the plan. Thus Section 706 provides:

> "No creditor shall be deemed to be 'affected' by the plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor."

No assertion is made, nor could one be made, that the order sought to be reviewed "proposes a modification of the evidence of debt or other instrument defining the rights" of the petitioners, or of their security.

It therefore follows, in our respectful submission, that since the petitioners are not "affected" by the plan there is no basis for the granting of writs of certiorari to review the order denying their claims.

(b)

In any case, Eppler has no right to be heard in this Court. The order sought to be reviewed, as we have stated, allowed a part of the amount applied for. This amount has been paid to Eppler and accepted by it. Under these circumstances, the right of appeal is lost. "Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other." *Kaiser* v. *Standard Oil Co.*, 89 Fed. 2d 58; see also, *Terry* v. *Abraham, et al.*, 93 U. S. 38; *Altman* v. *Shopping Center Bldg. Co.*, 82 Fed. 2d 521, 527; *Storley, et al.* v. *Armour & Co.*, 107 Fed. 2d 499, 504; *Colquette* v. *Crossett Lumber Co.*, 149 Fed. 2d 116.

II.

The Special Court had no jurisdiction to grant petitioners allowances chargeable against the Peoria.

The Special Court in refusing the allowances requested found it unnecessary to determine whether it had jurisdiction to grant such allowances under the statute. However, in two earlier decisions in this same adjustment proceeding the Special Court found that it lacked such jurisdiction. (*In re Peoria and Eastern Railway Company*, 37 F. Supp. 917 (1941), cert. denied 314 U. S. 635 and 49 F. Supp. 83 (1943).)

These determinations were made after the Plan of Adjustment was approved and when petitioner Aronstam, then as now representing the Income Bondholders, claimed compensation for his services.

In those decisions the Special Court, following the holdings in *Baltimore and Ohio Railroad Company*, 34 F. Supp. 154, cert. denied 311 U. S. 717, and *Schweidel* v. *Lehigh Valley Railroad Company*, unreported order, October 21, 1940, cert. denied 312 U. S. 684, held that in Adjustment Proceedings under Chapter XV as distinguished from Reorganization Proceedings, the Court had no power to grant allowances except to the debtor railroad. Thus the Court said (37 F. Supp. 917, 921):

> "It seems to us clear that Chapter 15 of the National Bankruptcy Act covering Railroad *Adjustments*, in so far as allowances to others than the petitioner Railway are concerned, is not in *pari materia* with Title 11 United States Code, Section 205, 11 U. S. C. A. §205, which deals with the *Reorganization* of Railroads. * * *
>
> It seems to us that the omission of such a provision from Chapter 15 of the National Bankruptcy Act, which gave a three-judge court jurisdiction in *Proceeding for Railway Adjustment*, makes it quite clear that we have not any jurisdiction properly to grant any allowances herein to the intervenors or their counsel."

It is significant that the earlier applications were made on exactly the same basis as presently. Then as now petitioner Aronstam represented the Income Bondholders. Then as now the petitioner claimed

that his services were for the benefit of the Peoria as a whole, while in fact he was acting for the Income Bondholders.

III.

No basis existed for granting the allowances sought.

As we have seen, the order of May 21, 1943, designated Mr. Aronstam "as counsel to represent the Income Bondholders of the Peoria and Eastern Railway Company in these proceedings before the Special Master", and provided that "the said counsel, with the approval of the Special Master, may employ accountants and traffic experts to assist him in connection therewith" (R. 14). As the Special Court expressly held (R. 71) "his request then made for an order that the compensation for such representation be eventually charged against the estate of the petitioning debtor was unequivocally rejected by the court".

Not only was the matter of petitioners' right to compensation thus determined at the outset, but, as the Court expressly found, that the petitioner Aronstam "himself disclaims any retainer direct or indirect by or in behalf of the debtor (R. 71).

Further, petitioner Aronstam has had associated with him throughout the major part of this proceeding counsel for one Wood, the owner of $961,000 of Income Bonds, who in fact advanced a large proportion of the petitioner Aronstam's disbursements (R. 38, 46, 47). It is, we suggest, not likely that this association and participation was for any interest other than the Income Bondholders. Under these circumstances,

it is difficult to understand how the petitioners can now assert that any of their activities were compensable by the debtor.

Moreover, as the Court found, the debtor was otherwise adequately represented (R. 71) and therefore the Court could not properly charge against the estate "an expense incurred solely at the instance of the bondholders" (R. 71).

In this connection we respectfully point out that, despite the assertion of the petitioners to the contrary (Aronstam petition, p. 14), the undersigned did in fact carry on an exhaustive independent investigation of the accounts and transactions between the parties for the period from 1920 through 1942 (R. 63, 64, 65). Further, the nature of the independent representation of the Peoria may be seen from the fact that despite the claims running into the millions asserted by the petitioners the few claims actually allowed were those originated by independent counsel or supported by him (R. 58).

Nor is there any basis for the claim particularly pressed by Eppler (Petition for Writ of Certiorari, pp. 10-12) that had there been a receiver or trustee in this case, and had the petitioners rendered services for such receiver or trustee, they would have been entitled to compensation at the hands of the Court.

The fact is that under the statute no receiver or trustee could be appointed and none was necessary. (*Ewen, et al.* v. *Peoria & E. Ry. Co.,* 34 F. Supp. 332, 338.) The activities of the petitioners were all directed toward improving the position of the security holders they represented; any benefit to the Peoria was plainly incidental to this interest.

Finally, even if it were assumed that this were a case in which the Court had some equitable power to grant an allowance, such a grant would be governed by the well settled principle in analogous cases that such compensation, when and if awarded, is always related to the amount recovered. (*Winkelman* v. *General Motors Corp.*, 48 F. Supp. 504; *The Counsel Fee in Derivative Stockholders' Suits*, 39 Columbia Law Review 784 and cases therein cited.)

Here as we have seen (*ante*, pp. 6, 7), the action of the petitioners resulted in an actual loss to the debtor railroad in the sum of $96,396.70 (R. 55-57). Moreover, if we add up the claims of Mr. Aronstam and those of Eppler we find that they aggregate $252,842.24. As against this the benefits alleged to have been secured (assuming no loss on account of interest charges incurred) amounted to only $246,-240.68, or an excess of allowances claimed over benefits alleged of $6,601.56.

In this connection, it should also be noted that no benefit whatever was obtained through the services of Mr. Cook of Coverdale and Colpetts, for whom Mr. Aronstam seeks $10,092.53 or from the services of William Wyer & Co. claiming $3,069.65, or from the services of R. P. Patterson and his assistant for whom $4,980.83 is sought (R. 50-53; 59-60). Not only did no benefit result from the activities of these persons, but the petitioner Aronstam never even sought or obtained approval of their employment by the Special Master, despite the direction of the order of May 21, 1943, that such approval be obtained (R. 14).

It therefore seems clear that this is a case in which the petitioners, acting in the interests of their prin-

cipals, sought to impose a huge liability, which if sustained, would have necessarily resulted in substantial financial gain to their principals. In the final event, however, the result was that not only was this effort unsuccessful but the debtor railroad was caused to sustain substantial losses. Under the circumstances, there is no basis, equitable or otherwise, upon which these allowances could be granted.

CONCLUSION.

No reasons for review by this Court having been shown, the petitions for writs of certiorari should be denied.

Respectfully submitted,

F. W. H. Adams,
Counsel for Respondent, The Peoria and Eastern Railway Company.

Peter Keber,
Of Counsel.